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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Hearing Date: January 19, 2011
10:00AM

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In re

Chapter 9

NEW YORK CITY OFF-TRACK
BETTING CORPORATION,

Case No. 09-17121 (MG)

Debtor.

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**OPPOSITION OF 991 SECOND AVENUE, L.L.C. TO DEBTOR'S SECOND OMNIBUS MOTION FOR AN ORDER AUTHORIZING THE REJECTION OF CERTAIN COMMERCIAL LEASES**

**TO THE HONORABLE MARTIN GLENN,
UNITED STATES BANKRUPTCY JUDGE:**

The 991 Second Avenue, L.L.C. (the "Second Avenue Landlord"), as and for its opposition to second omnibus motion by New York City Off-Track Betting Corporation (the "NYC OTB") (the Second Avenue Landlord and NYC OTB are hereinafter collectively the "Parties"), for an order authorizing the rejection of certain commercial leases (the "Rejection Motion"), respectfully represents and shows this Court as follows:

1. As part of its omnibus filing regarding disposition of leases in furtherance of a possible dismissal of the bankruptcy, NYC OTB seeks to reject an

amended lease made with the Second Avenue Landlord during the bankruptcy case. The amended lease effectively and legally created a post-petition contract. Accordingly, as a matter of law, NYC OTB cannot reject the amended lease under §365 and its motion should be denied as against the Second Avenue Landlord. Although in the end, the issue may become academic depending on the future status of the bankruptcy, the matter should not pass uncontested for completeness of the record going forward.

## BACKGROUND

2. On December 3, 2009 (the "Petition Date"), NYC OTB filed a voluntary petition for relief under chapter 9 of Title 11 of the United States Code (the "Bankruptcy Code"). On March 22, 2010, this Court entered an order for relied (the "Order for Relief") in the case.

3. As of the Petition Date, one of the unexpired leases of nonresidential real property held by the NYC OTB pertained to certain premises commonly known as 989-991 Second Avenue, New York City, New York (the "Second Avenue Premises").

4. NYC OTB leased the Second Avenue Premises from the Second Avenue Landlord pursuant to a certain indenture of lease dated as of November 30, 1990, between NYC OTB and Second Avenue Landlord's predecessor-in-interest, as amended by that certain first amendment as of May 27, 1992, and as amended by a second amendment as of January 1, 2007 (hereinafter collectively referred to as "Old Lease").

5. The financial terms of the Old Lease proved unworkable for NYC OTB although it desired to remain in possession of the Second Avenue Premises. Accordingly, NYC OTB and the Second Avenue Landlord entered into a settlement and new agreement which rejected the Old Lease in favor of a new one, dubbed "Amendment and Reinstatement Agreement" (the "New Agreement"), and tracked many provisions of the Old Lease but provided a shorter three (3) year term and lower monthly rent. A copy of the parties' Stipulation, Agreement and Order, Providing for Rejection, Reinstatement and Amendment of the Lease for Premises Located at 989-991 Second Avenue, New York, New York (the "Stipulation"), as "so ordered" by the Court on November 9, 2010 [Docket No. 198] is annexed hereto as Exhibit "A" with the Old Lease and the Amendment and Reinstatement Agreement.

6. Pursuant to the express terms of the Stipulation, a distinction was made from the pre-existing Old Lease. Moreover, the Amendment and Reinstatement Agreement, was approved under 11 U.S.C. § 904 and was deemed a binding obligation on NYC OTB not subject to adjustment under a chapter 9 plan. (*See* Stipulation ¶ 3).

7. Notwithstanding the foregoing, NYC OTB filed the Rejection Motion [Docket No. 249] on December 28, 2010 seeking an order authorizing the rejection of certain unexpired leases of nonresidential real property, including the lease relating to the Second Avenue Premises listed as No. 8 (location of 991

Second Avenue, New York, NY 10022, and with an erroneous expiration date of 10/31/2013).

**NYC OTB LACKS PROPER STATUTORY RIGHTS TO REJECT THE NEW LEASE ENTERED INTO AFTER THE PETITION DATE**

8. As with any action sought by a party in a bankruptcy case, the rational starting point is the statutory provision of the Bankruptcy Code that provides authority for the action sought. Here, NYC OTB references Section 365(a) of the Bankruptcy Code, applicable in chapter 9 cases by virtue of 11 U.S.C. § 901, as basis for the Subject Motion. While, as NYC OTB points out, Section 365(a) allows a debtor, subject to court's approval, to "assume or reject any executory contract or unexpired lease of the debtor". Significantly for our purposes, Section 365(a) is not applicable to contracts or leases that were entered into after the commencement of the case (i.e., after the petition date).

9. While the Bankruptcy Code fails to expressly address the status of leases entered into after the commencement and the ability of the debtor-in-possession to reject them, a well-respected treaties notes the "[s]ection 365 applies only if the contract or lease is in existence at the commencement of the case." 3 COLLIER ON BANKRUPTCY ¶ 365.02[2] at 365-22 (Alan N. Resnick & Henry J. Sommer, eds., rev. 15$^{th}$ ed. Rev. 2008).

10. Furthermore, courts that have considered this issue found that post-petition agreements are not subject to rejection under section 365. *See In re Leslie Fay Companies, Inc.*, 168 B.R. 294, 300 (Bankr. S.D. N.Y. 1994) ("There

are cases which have addressed the question of whether section 365 applies to post-petition agreements; the learning from these cases is that contracts … entered into postpetition are not subject to rejection under section 365.") (citing multiple cases).

11. Numerous appellate courts found that post-petition contracts and leases should not be subject to rejection under section 365, in that section 365 applies only to leases of a "debtor" rather than those of a "debtor-in-possession." *In re Merry-Go-Round Enterprises, Inc.*, 180 F.3d 149, 159 (4th Cir. 1999). *See also Adventure Resources, Inc. v. Holland*, 137 F.3d 786, 797 (4th Cir. 1998) (noting that section 365 pertains to "executory contracts and unexpired leases entered into by the debtor *prior to the filing of the bankruptcy petition*."). In particular, appellate courts "[a]fter examining the plain language and legislative history of § 365 and the policy of giving creditors a financial incentive to deal with a bankruptcy estate … concluded that § 365 should be limited to prepetition leases." *In re Merry-Go-Round Enterprises, Inc.*, 180 F.3d at 160 (*citing In re Cannonsburg Envtl. Assoc., Ltd.*, 72 F.3d 1260 (6th Cir. 1996); *In re Dant & Russell, Inc.*, 853 F.2d 700 (9th Cir. 1988)). Furthermore, as an appellate court noted, "extending § 365 to apply to a Chapter 11 debtor-in-possession would be contrary to both common sense and general bankruptcy policy." *In re Merry-Go-Round Enterprises, Inc.*, 180 F.3d at 160 (in that case, dealing with ability of Chapter 7 trustee to reject postconversion a lease entered into by a Chapter 11

debtor-in-possession postpetition, the court noted that allowing rejection of a post-petition lease "could lead to the unjust enrichment of a bankruptcy estate.").

12. Despite its administrative aims and intentions, NYC OTB is bound by this line of case law and no longer enjoys the ability to simply reject the New Lease for the Second Avenue Premises created and recognized by the Stipulation. In fact, NYC OTB has already recognized a rejection claim in favor of Second Avenue Landlord of $3,962,480.80 arising out of the rejection of the Old Lease. (*See* Stipulation ¶ 4).

13. The termination and surrender of possession under the Stipulation creates a new and separate claim under which the Second Avenue Landlord hereby reserves all rights and remedies for purposes of future proceedings in bankruptcy or state court.

WHEREFORE, Second Avenue Landlord respectfully requests that the Court deny NYC OTB's motion as it relates to the Second Avenue Lease, together with such other and further relief as is just and proper.

Dated: New York, New York
January 11, 2011

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